

7-12-2017

BNCCORP et al. v. HUB et al., CA-CV 15-0708, (2017)

In Arizona, a jury-trial waiver is enforceable in negligence actions. Importantly, the jury trial need not be “knowingly and voluntarily waived,” and a corporate parent’s waiver can bind its subsidiary.

BNCCORP is a registered bank holding company that operates through wholly owned subsidiaries (“BNC”). HUB is a collection of insurance services companies. In 2007, HUB became BNC’s broker of record pursuant to a purchase and sale agreement (“PSA”), which included a waiver of the right to a jury trial. Later BNC discovered a “fraudulent lapping scheme” that defrauded it of \$26 million. BNC’s insurance carriers denied its claims and filed for declaratory judgments. BNC counterclaimed for breach of contract, bad faith, and punitive damages. BNC settled against the insurance carriers, and immediately filed suit against HUB, asserting a claim for negligence, and demanding a jury trial.

In separate rulings in HUB’s favor, the trial court found: (1) under the PSA, BNC had waived its right to a jury trial; and (2) HUB did not breach the applicable standard of care or proximately cause BNC’s damages.

BNC appealed both rulings.

Jury Waiver

On appeal, the court held a negligence action falls within the terms of the PSA’s jury waiver. Specifically, HUB’s allegedly negligent broker services, arose out of, and were a “transaction contemplated” by, the PSA. The court also held the jury trial waiver is similar to an agreement to arbitrate, and in a civil action, need not always be directly “knowingly and voluntarily” waived. Importantly, the court held a wholly owned, non-signatory subsidiary is bound by its parent company’s contractual agreement to forego a jury trial.

Negligence/Standard of Care

The court of appeals affirmed that the default standard of care for a broker (like HUB), who agrees to obtain insurance for a client, owes the client a duty “to exercise reasonable care, skill, and diligence,” but, the standard it is determined on a case-by-case basis, and must be established by expert testimony.

Applying the standard, the court of appeals held there was sufficient evidence that HUB did not breach its standard of care to BNC. The court ruled that “where a bank fails to identify or foresee its own risks, but makes a general request for additional coverage recommendations, a broker need not assess for risks absent a specific request to identify, and an agreement to do so, accompanied by adequate information to undertake such assessment.” Accordingly, HUB had obtained coverage for BNC that was consistent with, or better than, BNC requested.